



20
FILED

APR 1 1945

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In The
Supreme Court of the United States

OCTOBER TERM, 1945

NO. 935

MODERN PRODUCTS SUPPLY COMPANY,
Petitioner,

v.

RICHARD E. DRACHENBERG, doing business
as **Drachenberg Products Mfg. Co.,**
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR THE WRIT OF CERTIORARI**

CLARENCE B. ZWADENKI,
3053 Penobscot Bldg., Detroit,

HOWARD H. CAMPBELL,
520 Hammond Bldg., Detroit,
Counsel for Respondent.

INDEX

	PAGE
Report of Opinions Delivered Below.....	2
No Sound Reason for Jurisdiction Has Been Advanced	2
Petitioner Was the Distributor of Respondent's Machine	5
Petitioner's Attacks on the Drachenberg Patent are Based Entirely on the Prior Patent Art.....	7
Petitioner Over-Simplifies and Modifies the Prior Art in an Effort to Build Up a Prior Art Machine.....	11
Respondent's Claims Define True Combinations.....	14
Respondent's Invention Resides in a New Combination of Old Elements.....	15
Respondent's Commercial Machine Embodies His Invention	15
The Scope of the Drachenberg Claims Were Not in Issue	16
Conclusion	17
Appendix	18

INDEX OF AUTHORITIES

	PAGE
Altoona Publix Theaters v. American Tri-Ergon Corp., 294 U. S. 477.....	3
Muncie Gear Works, Inc., et al. v. Outboard, Marine & Mfg. Co. et al., 315 U. S. 759.....	3, 4
Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464.....	3
Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47.....	2, 3, 4
Williams Mfg. Company v. United Shoe Mach. Company, 316 U. S. 364.....	11, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 935

MODERN PRODUCTS SUPPLY COMPANY,
Petitioner,

v.

RICHARD E. DRACHENBERG, doing business
as Drachenberg Products Mfg. Co.,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR THE WRIT OF CERTIORARI**

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United States:

Your respondent, Richard E. Drachenberg, opposes the
Petition for Certiorari.

REPORT OF OPINIONS DELIVERED BELOW

The District Court filed a formal opinion (contrary to the Petition, p. 7) in the form of Findings of Fact and Conclusions of Law holding, among other things, that Claims 6, 7, 8, 9, and 15 of Drachenberg patent No. 2,273,093 are valid over the prior art and infringed (R. II, 765-774). The District Court's Findings and Conclusions are reported in 63 U.S.P.Q. 292. The Findings and Conclusions were not reported in the Federal Supplement, probably because they followed the usual and routine course of an ordinary patent infringement suit.

The Sixth Circuit Court of Appeals affirmed the judgment of the District Court in an opinion reported at 152 F. (2d) 203.

NO SOUND REASON FOR JURISDICTION HAS BEEN ADVANCED

The Petition for Certiorari presents none of the grounds for granting certiorari as is set forth in Rule 38, 5(b). There is no conflict of decisions; no federal decision in conflict with applicable decisions of this Court; and no departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner has cited (p. 7) the following four cases which it alleges sustain the jurisdiction of this Court:

Schriber-Schroth Co. v. Cleveland Trust Co.,
305 U. S. 47;

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464;

Altoona Publix Theaters v. American Tri-Ergon Corp., 294 U. S. 477;

Muncie Gear Works, Inc., et al. v. Outboard, Marine & Mfg. Co., et al., 315 U. S. 759.

In the *Schriber-Schroth* and *Paramount* cases, there were no concurring opinions by the Courts below. In the *Altoona* case, while the Courts below concurred in the results, this Court held that the findings were not concurrent (p. 480).

In the *Muncie* case, as well as in the *Schriber-Schroth* case, certiorari was granted because the entire industry affected by those patents in suit was so concentrated in the single Circuit in which each case was tried that litigation in other Circuits which might result in a conflict of decisions appeared unlikely.

Petitioner erroneously urges that the same grounds for granting certiorari in the *Schriber-Schroth* and *Muncie* cases are present in this case. Petitioner states (p. 9) that as respondent is a resident of the Sixth Circuit and owns a valid patent, the entire industry engaged in the manufacture of juice extractors will not only be concentrated in the Sixth Circuit, but will be concentrated in the hands of respondent.

Needless to say, every patent is "concentrated" in the hands of its owner, and if that be grounds for certiorari, then every infringement suit should be automatically reviewed by this Court.

The *Schriber-Schroth* case was accepted by this Court because the automobile industry—not the inventor—was concentrated in the Sixth Circuit. The *Muncie* case was accepted by this Court because the outboard motors industry—not the inventor—was concentrated in the Seventh Circuit. If the automobile or outboard motor manufacturers had been located in various Circuits, so that the patent would have been open to infringement and attack in a different Circuit, then those grounds for certiorari in the *Schriber-Schroth* and *Muncie* cases would not have been present.

So far as respondent knows, there is not a single manufacturer of juice extractors in the entire Sixth Circuit, other than respondent, who has ever manufactured juice extractors coming within the terms of the claims of the Drachenberg patent. Petitioner is a resident of the *Seventh Circuit* (R. I, 1) and personally chose the jurisdiction of the Sixth Circuit for the trial of its controversies with respondent. Petitioner's infringement in this case consisted of selling infringing machines which, respondent understands, were manufactured for it by a concern located in the *Eighth Circuit*. As far as respondent knows, the manufacture of all juice extractors ceased during the war. Since the end of the war, a manufacturer in California—the *Ninth Circuit*—and an importer in Buffalo, New York—the *Second Circuit*—have begun the manufacture and promotion of infringing juice extractors. Respondent has formally notified these infringers, as is evidenced by the two letters printed in an Appendix hereto.

The juice extractor covered by the Drachenberg patent can be manufactured and assembled in any part of this country, and there is no economic or geographical reason why its manufacture should be concentrated in any par-

ticular location. Respondent therefore submits that petitioner has failed to state any grounds which should cause this Court to accept this case for review.

PETITIONER WAS THE DISTRIBUTOR OF RESPONDENT'S MACHINE

Petitioner is a Wisconsin corporation organized to distribute and promote the sale of household appliances such as juice extractors, shredders, liquefying machines, etc. (R. I, 30). Dr. Hauser, an expert food specialist (R. I, 371) particularly with regard to vegetable juices, promoted the sale of the products of the petitioner as well as the sale of food products of certain allied companies. He brought the "juice idea from Germany and was very instrumental in getting the juice therapy introduced to America" (R. I, 371). Because of the many health lectures given by him, Dr. Hauser made many "converts" to the drinking of juices of raw vegetables (R. I, 370). For many years and until the advent of the Drachenberg machine he sold to these people vegetable juice extracting machines that were operated by hand (R. I, 370). These machines were very slow and difficult to handle (R. I, 370). They were more or less like a meat grinder with a screw in it (R. I, 81).

Some time prior to May 19, 1937, respondent invented the Drachenberg macerator and juice extractor and on that day filed an application for United States Letters Patent which was issued on February 17, 1942, as patent 2,273,093 (R. III, 926). This machine was adapted to extract juices from fruits and from vegetables, such as carrots, celery, spinach, etc. (R. III, 928, 11. 23-29 Col. 2).

Since 1912 to the time of trial Edward Neumann had been a retail and wholesale health food merchant of Detroit, Michigan, selling health foods and instruments relating thereto such as juice extracting machines (R. I, 367). He began selling the little manual juice extractor of Dr. Hauser about 1933 or 1934 and that was the best machine on the market at that time (R. I, 369). He had examined fifteen or sixteen different machines for this purpose (R. I, 372). Some time prior to September 20, 1937, he learned of Drachenberg's juice extractor. When Dr. Hauser came to Detroit to deliver a lecture, Neumann introduced Drachenberg to Dr. Hauser (R. I, 371). Within a very few minutes, Dr. Hauser attempted to obtain the exclusive sales of the Drachenberg machine for the entire world (R. I, 371).

On September 20, 1937, an exclusive sales agent agreement for the United States was entered into between Modern Health Products, Inc., one of Dr. Hauser's companies, and Drachenberg for a period of one year, with the privilege by Modern of extending the agreement for two additional years, which privilege was exercised (R. III, 892). The Drachenberg extractor was made under this contract by Drachenberg (R. I, 115-116).

After the agreement of September 20, 1937 ran its term of three years, the same arrangement without any contract continued until April 4, 1941, when respondent and the predecessor of petitioner entered into a sales agreement for one year (R. I, 141).

Prior to the expiration of the sales agreement on April 4, 1942, petitioner caused the manufacture of a cheap imitation of respondent's machine and sold it to the trade (R. I, p. 143).

Respondent, learning of this cheap machine, notified petitioner that by its sale, petitioner was infringing the Drachenberg patent (R. I, 143-144).

Petitioner countered with a written notice to respondent to the effect that by the manufacture of his machine, he was infringing petitioner's Jenkins patent 1,953,714 (R. I, 144).

On November 25th, 1942, petitioner filed its complaint against respondent, alleging among other things the infringement of Jenkins patent (R. I, 1). Respondent answered and filed a counter-claim, alleging infringement of the Drachenberg patent. The decisions of the Courts below resulted in sustaining respondent's position.

PETITIONER'S ATTACKS ON THE DRACHENBERG PATENT ARE BASED ENTIRELY ON THE PRIOR PATENT ART

In the District Court, petitioner urged the invalidity of respondent's patent, particularly in view of its own Jenkins patent. In petitioner's opening statement before the District Court, petitioner stated:

"The plaintiff denies infringement and asserts that these claims in issue, 6, 7, 8, 9, and 15, are all invalid because they involve no invention over the prior art, and particularly over the Jenkins patent, which substantially antedates the Drachenberg patent" (R. I, 28).*

The Jenkins patent was a Drachenberg file wrapper reference. (Petitioner has failed to include the Drachen-

*Emphasis in all quotations is Respondent's.

berg file wrapper in the printed record. It is Physical Exhibit M-2.) On appeal, petitioner shifted its emphasis as to the prior art and urged that the Drachenberg patent was invalid in view of the patents to Brophy No. 1,454,918 issued in 1923 (R. III, 861), and Steere No. 1,346,739 (R. III, 849) issued in 1920. These patents were published seventeen and fourteen years before respondent filed his application for patent. Petitioner relied on these two specific patents because neither of them was cited against Drachenberg during the prosecution of his application. However, patents such as Crowe No. 1,993,337 (R. III, 948) and Streckfuss No. 2,026,918 (R. III, 952) disclosing subject matter similar to the disclosure of Brophy, were cited. Patents such as Moore No. 1,369,978 (R. III, 942) and Gare (British) No. 8,976 of 1907 (R. III, 933) disclosing chutes eccentrically located, were cited by the Examiner rather than Steere's patent. The Examiner also relied upon the more applicable Jenkins macerating disk than the cutters of Steere. The Examiner by means of these cited patents built up a better device than the device built up by petitioner when using the disclosures of Brophy and Steere.

The Drachenberg claims were not allowed until after appeal to the Board of Appeals in the Patent Office. In holding that the claims were patentable, the Board of Appeals in its decision stated:

"Claims 34 (claim 9 of the patent) and 36 specify that the open end of the chute is located eccentrically of the area of the rotatable macerating table. Jenkins does not show this feature. *Moore, cited, shows this eccentric arrangement in a cotton seed huller but we think that applicant*

obtained such an improved result in his macerating device that it would not be obvious to modify the Jenkins patent to meet these claims" (Drachenberg File Wrapper. p. 130; R. III, 1018).

Again the Board stated:

"Many of the claims, among which is claim 46, specify that the receptacle is perforated and a stationary housing encloses the receptacle which receives the juices passing through the perforated receptacle. Applicant argues that in the Jenkins patent the juice which passes through the screen and upward along the wall, will be agitated so that it foams. He states that this is very objectionable. It is true that the Crowe patent cited shows a roatable receptacle which has a perforated wall. However, this patent relates to a juice extractor of a different type. We think that the above limitation in the claims render the apparatus claims patentable over the prior art" (Drachenberg File Wrapper, pp. 130-131; R. II, 1018).

It is therefore obvious that the Circuit Court of Appeals had ample reason for stating in its opinion that:

"Appellant now contends that Brophy, 1,454,918, and Steere, 1,349,739, both of which were not considered in the Patent Office, require a holding of invalidity. Brophy's patent is for an orange juicer. It discloses the familiar reamer upon which one-half of an orange or lemon is pressed, with the result that the pulp and juice are separated from the skin, which is left intact. By centrifugal action the pulp and juice are thrown against a rotating filter, separating the juice from the pulp. Steere is a fruit and vegetable pulping machine. It does not separate the pulp from the juice centrifugally, but it has an eccentric material holder or hopper.

"Patents, however, were before the Board of Appeals in which these identical features were presented. The examiner had considered the orange juicers of both Streckfuss, 2,025,918, and Crowe, 1,993,337. The appellants admit that Crowe is similar to Brophy, and in all essentials these patents disclose the elements in Brophy which are now said to require reversal. The eccentric chute was before the examiner in Moore, 1,369,978, and Gare (British) 8976/07. *All of the features which were claimed to invalidate Drachenberg were considered by the Board of Appeals and held not to be controlling*" (R. III, 1018-1019).

In view of this situation as above quoted, it is submitted that the Circuit Court of Appeals was also correct in applying the law as stated in its opinion in these words:

"The presumption of priority and validity which arises from the granting of a patent has greatly increased weight when the claim of the inventor is subjected to close and careful scrutiny in the Patent Office under the stimulus of a heated contest. *Hildreth v. Mastoras*, 257 U. S. 27; *Consolidated Bunting Apparatus Co. v. Peter Schoenhofen Brewing Co.*, 28 Fed. 428. While no private parties intervened in this case, a very vigorous contest was made over the issuance of the patent. Repeated amendments were offered to the various claims, some of which the examiner allowed. The Board of Appeals, after an exhaustive examination of the state of the art, sustained the examiner as to three claims, but reversed him as to all claims in suit herein. Most of the pertinent references in the record were before the Patent Office and were rejected as anticipations. This fact greatly strengthens the presumption of novelty and invention which arises from the grant of the patent" (R. III, 1019).

The Circuit Court of Appeals, however, did not rely solely upon the above quoted law, but considered the prior art *de novo* (R. III, 1019-1021) and found that the Drachenberg device came within the old, familiar rule as stated in its opinion in these words:

“We apply the familiar rule that a combination to be valid must achieve a new and important result in a substantially new way;” (R. III, 1017).

In the case of *Williams Mfg. Company v. United Shoe Mach. Company*, 316 U. S. 364, Mr. Justice Roberts, speaking for this Court, said:

“The courts below have concurrently found that none of the earlier patents cited * * * embodied the combinations of the challenged claims * * *. These findings are to the effect that the new combinations while they involve old mechanical constructions combine these in a new way so as to produce an improved result. *These are findings of fact*, despite the petitioner’s apparent contention to the contrary, and *we will not disturb such concurrent findings where, as here*, there is evidence to support them.”

PETITIONER OVER-SIMPLIFIES AND MODIFIES THE PRIOR ART IN AN EFFORT TO BUILD UP A PRIOR ART MACHINE

Petitioner’s effort (pp. 3, 13) to pictorially combine Brophy and Steere over-simplifies their teachings. This Court’s attention is respectfully directed to the Steere patent for its disclosure (R. III, 849).

The Steere patent is entitled “Fruit and Vegetable Pulping Machine.” Van Deventer, petitioner’s expert,

testified that the Steere patent did not disclose a centrifuging machine and that the resulting product of the Steere machine was a mixture of pulp and juice (R. II, 622). Steere discloses a machine having a driven vertical shaft H. Mounted around this shaft and rotatable therewith is a closed drum G. On the outer surface of this drum are arranged tapered ribs G⁵. Surrounding the drum and slightly spaced therefrom is a stationary strainer E. Also mounted on the outer surfaces of the drum G are brushes P to clean the seeds and stems from the strainer so they will fall to the bottom of the machine by gravity. Mounted on top of the drum G and rotatable therewith is the plate L having radially mounted on its upper face a series of "cutters or ribs" M, substantially rectangular in cross section. These ribs extend beyond the periphery of the plate and closely approach the stationary strainer E at its very top. A material holder or chute D⁵ is spaced from and eccentrically mounted above the plate.

The Steere operation is as follows: The power is turned on and the shaft, closed drum, and the plate carrying the cutters chop up or finely cut the material. As the strainer E is stationary, it is obvious that the material cut by each of the knives will be thrown outwardly and at all times strike the same segment of the strainer. This, no doubt, causes a piling up of the material at one particular location and should the material fail to drop between the outwardly projecting ribs M into the space between the rotating drum and stationary strainer, the machine will very quickly clog. The material that does fall between the rotating drum and stationary strainer is carried downwardly by the tapered ribs G⁵, and by this

action are crushed and pressed through the strainer, supposedly leaving only the seeds and stems on the inner surface of the strainer. The brushes, as they rotate with the drum, sweep these seeds and stems off the stationary strainer and they fall to the bottom of the machine. The pulp and juice squeezed through the strainer pass into the space between the strainer and the casing A, where they drop to the bottom and out of the opening A'.

The Brophy patent (R. III, 861) relates to a machine for the extracting of juice from citrus fruits. It is for an entirely different purpose than Drachenberg, for where Drachenberg's purpose is to macerate the so-called non-juicy fruits and vegetables and all of the material including skins, Brophy's device is for the purpose of reaming out the inner half of a juicy orange, leaving the skin intact. So Brophy provides a motor 1 with a vertical shaft 4. Mounted around and above the shaft is a reamer 6 which also acts as the hub of the rotating filter bowl 8. There is an outer stationary casing 2 having an outlet 3. Brophy starts the motor of his machine. He also slices an orange in two and then takes one half and presses the exposed portion onto the reamer. This reams out the pulp and the juice, leaving the skin intact. The pulp and juice is then thrown outwardly by centrifugal force against the sides of the rotating filter bowl, causing the juice to separate from the pulp and pass through the filter into the casing 2 and out the outlet 3.

The sketches in the petition and brief take many liberties with the disclosures of Steere and Brophy. The rectangular cutters of Steere, in order to function according to that patent, must extend radially beyond the disk carrying them. The drawings in the petition and brief have conveniently modified this most important element,

so that Steere is really given credit for providing a cutting disk simulating the Jenkins or Naylor type which the Examiner used in his built-up machine in the Patent Office. Petitioner's artist removed all of Brophy's rotating shaft and has cut off the top portion of Brophy's reamer. He has substituted Steere's shaft for Brophy's, thereby causing Steere's cutting disk to be mounted on top of the remaining portion of Brophy's reamer and located midway between the top and bottom of Brophy's strainer. He has positioned the feed chute of Steere well within Brophy's strainer, which would defeat its very purpose in Steere. Whether or not this arrangement is inoperative, respondent does not know, because such a machine has never been made. It is obvious that the elements of those two patents could never be combined without changing many of them.

RESPONDENT'S CLAIMS DEFINE TRUE COMBINATIONS

Respondent agrees with petitioner's statement (Point II, page 10) that "it is not invention merely to select and aggregate unrelated features taken from the prior art." That statement has no application to the issues in this case. Each of the elements provided for in the Drachenberg claims must and does, cooperate with some one or more of the other elements in order to extract juice. The Circuit Court of Appeals held that the Drachenberg invention constituted a combination which achieved a new and important result in a substantially new way. This Court, in the case of *Williams Mfg. Company v. United Shoe Mach. Company, supra*, states that this finding is a finding of fact and will not be disturbed if there is evidence to support the finding.

RESPONDENT'S INVENTION RESIDES IN A NEW COMBINATION OF OLD ELEMENTS

Petitioner is inconsistent, for in Points II and III of its argument it contends that the Drachenberg device is an aggregation of unrelated features,—yet in point V (p. 15) of its argument it asserts that the Drachenberg claims are combination claims but that

“The old combination to which the claims at issue are directed cannot be repatented merely because respondent claims to have improved one of the elements.”

This argument is without merit because respondent has never made such a claim. Petitioner has even failed to identify the element which it states is improved and upon which invention hangs. Respondent's invention lies in a new combination comprised of old elements which achieve a new and important result in a substantially new way. That is the concurrent conclusion arrived at by both Courts below, and that conclusion should not be disturbed by this Court.

RESPONDENT'S COMMERCIAL MACHINE EMBODIES HIS INVENTION

Respondent does not understand the point that petitioner attempts to make when it states (Point 4, p. 14) that “the claims at issue do not include the structure upon which Drachenberg's alleged commercial success is based.” If petitioner is urging that Drachenberg's commercial machine does not embody the inventions as defined by the claims of Drachenberg's patent, then peti-

tioner's entire argument that this Court should review this case, is punctured, because if the commercial product is not covered by the claims, petitioner and any other of the public can manufacture the Drachenberg commercial device. If petitioner is not urging the above argument, then it must be urging that Drachenberg's success has arisen because he has practiced his invention in so perfect or practical a manner as to obtain the utmost out of his invention. Certainly, respondent should be commended rather than criticized for this; and the commercial success must still be credited to the invention, for the invention is the sole basis for the successful structure.

The Circuit Court of Appeals also found that the need for such a device as Drachenberg's had long existed, and that the utility of the Drachenberg device is clearly shown (R. III, 1021-22).

THE SCOPE OF THE DRACHENBERG CLAIMS WERE NOT IN ISSUE

Respondent does not understand petitioner's argument (p. 5) to the effect that the Sixth Circuit Court of Appeals broadly interpreted this patent. There was no issue before the Circuit Court of Appeals to necessitate the interpretation of the claims. Petitioner was selling an infringing machine which was an exact imitation of the Drachenberg patent and commercial machine (Finding 9, R. II, 771). In its brief before the Court of Appeals, the only statement petitioner made regarding the question of infringement was in these words:

"Plaintiff urges that the findings of infringement should be reversed on the ground of lack of invention in the Drachenberg claims in issue."

Petitioner in its petition (p. 2) states:

“It is conceded that these claims are infringed, if valid.”

In other words, petitioner has admitted that if the Drachenberg claims are not anticipated, then it infringes. The rule of equivalents was not invoked, nor did the claims have to be interpreted in any manner whatsoever. The claims simply spoke for themselves.

CONCLUSION

Respondent respectfully submits that as there are no unusual issues involved, and as both Courts below concurred in their opinions, the petition for the writ of certiorari should be denied.

Respectfully submitted,

CLARENCE B. ZEWADSKI,
HOWARD H. CAMPBELL,
Counsel for Respondent.